

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

GEORGE WESLEY,

Plaintiff,

vs.

NEW BREED LOGISTICS, et al.,

Defendants.

CASE NO. 12-CV-2419-LAB-RBB

**ORDER DENYING EXTENSION  
OF TIME TO FILE OPPOSITION;  
AND**

**AMENDED ORDER OF  
DISMISSAL**

On October 12, 2012, Defendants filed a motion to dismiss the complaint for failure to state a claim, with a hearing date of January 7, 2012. Under this Court's Civil Local Rule 7.1(e)(2), the opposition was therefore due 14 calendar days earlier. Because the courthouse was closed on December 24, under Fed. R. Civ. P. 6(a)(3), the opposition was due no later than December 26. Plaintiff George Wesley did not file an opposition when due, however, and Defendants filed a notice pointing this out. On December 28, 2012, Wesley submitted a request for extension of time to file his opposition. Because it was not in the proper form, it was accepted by discrepancy order on January 2, 2013, *nunc pro tunc* to December 28.

On January 3, the Court issued an order construing Wesley's failure to file a timely opposition as consent to the motion's being granted, and dismissing the complaint with prejudice.

1     **Motion for Extension**

2           Wesley motion for extension of time says he knew of the January 7 hearing, but  
3        wanted an extension of time. No reason for the extension is given; the motion merely says  
4        “The Plaintiff needs extra time to compile an opposition argument against above mentioned  
5        defendants.” This isn’t an adequate explanation, particularly because Wesley has had two  
6        and a half months to prepare his opposition. The body of the motion to dismiss is only eight  
7        pages long, and Wesley’s earlier filings show he is capable of drafting and filing substantial  
8        legal documents. In addition, the request was filed two days after the opposition was due.

9           Under Fed. R. Civ. P. 6(b)(1)(A), the Court may extend time on a party’s request, if  
10       the request is made before the time expires. Under Rule 6(b)(1)(B), the Court may extend  
11       time on a party’s motion, provided the party failed to act because of “excusable neglect.”  
12       Under either provision, good cause is required. The facts discussed above suggest the  
13       absence of good cause, and Wesley has not shown excusable neglect. Rather, the record  
14       suggests The request is therefore **DENIED**.

15     **Amended Dismissal**

16           Under Civil Local Rule 7.1(f)(3)(c), the Court may construe Wesley’s failure to file an  
17       opposition as consent to the motion’s being granted.

18           The complaint brings Title VII claims for age and national origin discrimination in  
19       employment, and sexual harassment, as well as a supplemental claim for defamation in  
20       connection with Wesley’s employment relationship. The motion to dismiss points out Wesley  
21       never exhausted his age or national origin discrimination claims as required, and that his  
22       defamation claim is time-barred. It also points out that, while an employer might be liable,  
23       the individual defendants are not liable under Title VII. Nor would they be liable under the  
24       ADEA. See *Miller v. Maxwell's Int'l Inc.*, 991 F.2d 583, 587 (9th Cir.1993) (holding that Title  
25       VII, the ADA, and the ADEA do not impose individual liability on employees).

26           These are serious problems for Wesley’s claims and would merit dismissal with  
27       prejudice of these claims. The Court is mindful of its “duty to ensure that pro se litigants do  
28       not lose their right to a hearing on the merits of their claim due to ignorance of technical

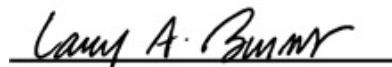
1 procedural requirements." See *Balisteri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9<sup>th</sup> Cir.  
2 1990) (citations omitted). But that does not appear to be a danger here. Rather, it appears  
3 these claims would fail even if Wesley were given more time to formulate his opposition. In  
4 other words, Wesley is not losing his right to a hearing on the merits because of a mere  
5 technical error.

6 The Court's earlier order of dismissal, however, dismissed the entire complaint with  
7 prejudice. But, on review, the motion to dismiss only sought dismissal of some claims with  
8 prejudice. The order of dismissal entered January 3, 2013 is therefore **WITHDRAWN** and  
9 the Clerk is directed to remove it from the docket. Instead of dismissing the entire action with  
10 prejudice, the Court instead **DISMISSES WITH PREJUDICE** Wesley's claims for age and  
11 national origin discrimination and for defamation, and his discrimination and defamation  
12 claims against the individual Defendants Larry Huffman, Sandra Hunter, and Janice Saffian.  
13 The only remaining claim identified in the complaint is a sexual harassment claim against  
14 Defendant new Breed Logistics. The complaint is **DISMISSED WITHOUT PREJUDICE**.

15 If Wesley wishes to file an amended complaint, he must do so no later than January  
16 31, 2013. The amended complaint must not include any claims dismissed with prejudice or  
17 it will be subject to dismissal. He is also reminded that any amended complaint must comply  
18 with the requirements set forth in Fed. R. Civ. P. 8(a).

19 **IT IS SO ORDERED.**

20 DATED: January 12, 2013

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22 **HONORABLE LARRY ALAN BURNS**  
United States District Judge  
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